

**ENVIRONMENTAL PROTECTION COMMISSION  
MINUTES  
SPECIAL MEETING  
December 14, 2005**

Auditorium, Town Hall

5:00 PM

**Commission Members Present:**

Chairman Peter Hillman, Ned Lewis, Pete Kenyon, Reese Hutchison, Ellen Kirby, Craig Flaherty, Susan Cameron

**Commission Staff Present:** Director of Planning, Jeremy Ginsberg, Assistant Director of Planning, David Keating

**Court Reporter:** Bonnie Syat

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Mr. Hillman read the following legal notice:

Public Hearing regarding the Referral from the Planning and Zoning Commission about the proposed Nearwater Manor at 77 Nearwater Lane and discussion about the possible jurisdiction of the Environmental Protection Commission with respect to this project.

Susan Cameron explained that she is a member of the Board of the Darien Land Trust and in order to avoid any perception of a conflict of interest, she will not be sitting on the Environmental Protection Commission regarding this matter. She then left the meeting.

Mr. Ginsberg read into the record a list of the materials that are already in the Environmental Protection Commission file regarding this matter. Mr. Hillman distributed a letter from Town Counsel, James D'Alton Murphy of Curtis Brinckerhoff & Barrett dated December 14, 2005. Members of the Commission had not seen the letter before and were given time to read the letter to themselves. Copies of the letter were distributed to Mr. & Mrs. Stefanoni, who own 77 Nearwater Lane, the attorneys representing adjacent property owners, members of the press, and some members of the public. In response to a question from Mr. Hillman, Mr. Stefanoni said that the proceedings were being videotaped by Robert Detmer.

Chairman Hillman noted for the record that several petitions for intervention had been received even though there was not a pending application. The Environmental Protection Commission has previously discussed the subject property and had determined, back in 2000, that there was some inland wetland area to the south of the site and that the 50 foot regulated area extended into the property at 77 Nearwater Lane. In 2002, additional information was submitted by Soil Scientist, Thomas Pietras, to indicate that the wetlands to the south of the property were tidal wetlands and, based on that information, the Environmental Protection Commission ruled that they did not have jurisdiction because tidal wetlands are regulated by the State of Connecticut and not by the local Inland Wetlands agency. He said that is up to the Environmental Protection Commission to decide if they do have jurisdiction. The Petitions for Intervention and Petition signed by the general public request that the EPC exert jurisdiction over the property and purport to have information that is pertinent. Mr. Hillman said that the burden is therefore on the interveners and the petitioners to show why they think the subject property is within the jurisdiction of the Environmental Protection Commission.

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Mr. Hillman explained that the Environmental Protection Commission has hired a professional engineer, James MacBroom, to help them assess this situation. A letter of December 14, 2005 was then submitted and reviewed. Mr. MacBroom is still in the process of gathering information and will submit that information in a detailed report as soon as possible. Mr. Hillman said that if the Environmental Protection Commission determines that the project is within their jurisdiction, then the Stefanonis will need to submit a Permit application to the EPC. If the EPC decides that it is not within their jurisdiction, then the EPC can submit advisory comments to the Planning & Zoning Commission.

Attorney Wilder Gleason represented the Darien Land Trust and explained that per Section 2.1y of the Darien Inland Wetlands and Watercourses Regulations, if the proposed activity is within the horizontal dimensional area specified in the Regulations, within 50 feet of an inland wetland, or within 100 feet of Holly Pond, then the property owners must apply for a Permit from the Environmental Protection Commission. He said that Holly Pond is a tidal water body and it is also the end of the Noroton River and has brackish water and a tidal flow. The end of the Noroton River/Holly Pond is restricted by a dam. Mr. Hillman noted that in a legal opinion (in which the Stefanonis' had argued about their access rights to Holly Pond) it refers to the edge of Holly Pond as being Elevation 4.2 feet above sea level. He asked Mr. Gleason why he was referring to mean high water as being Elevation 4.3. Mr. Gleason referred to a large photograph that is dated 4/10/05 and noted the ditches to the north of the open water off Holly Pond and that these watercourses on the Land Trust property are part of Holly Pond and extend up to and within 100 feet of the Stefanoni site and that there are associated inland wetlands within 50 feet of the site. Mr. Hillman said that it would be appropriate to inquire of the Connecticut Department of Environmental Protection, which regulates tidal wetlands, if and how the Stefanoni site is within their inventory and/or within their jurisdiction.

Attorney Gleason said that Holly Pond is a tidally influenced watercourse and that the edge of the Pond is higher than Elevation 4.3 (which is a legal term used to define ownership.) He said that land below Elevation 4.3 is owned by the State of Connecticut and that private ownership did not begin until Elevation 4.3 and above sea level. He said that under Section 2.1y.1 of the Inland Wetlands and Watercourses Regulations, the area within 100 feet of the edge of Holly Pond is subject to the applicants' obtaining a Permit from the EPC and also, if the work is within 50 feet of any inland wetlands or watercourse, the applicant must obtain a Permit from the EPC and also if the activity will impact or will affect any inland wetlands or watercourse, then the applicant must obtain a Permit from the EPC. He said that the local inland wetlands agency (the Darien Environmental Protection Commission) cannot assert jurisdiction over the tidal wetlands because that is the sole jurisdiction of the State of Connecticut, but the Commission must, by its own Regulations, regulate any activities within 100 feet of Holly Pond. He said that the State only regulates the tidal wetlands, not the upland area near the tidal wetlands, except for the land which is not more than one foot above the local high water (which is Elevation 5.8 feet above sea level and therefore the state jurisdiction of tidal wetlands does not exceed Elevation 6.8 feet above sea level). He said that any wetlands above Elevation 6.8 feet above sea level cannot be a tidal wetland by definition. He said that what soil scientist Tom Pietras called an inland watercourse in 2000 (when working for the Town) and was reexamined by Mr. Pietras in 2002 (when working for the Stefanonis) and was at that time referred to as a tidal wetland, is in fact an inland wetland. He said that Mr. Pietras did not have the benefit of knowing the elevation of that area was above Elevation 6.8 feet, and therefore, by definition could not be a tidal wetland.

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Attorney Gleason submitted a large map showing the property of the Darien Land Trust and said that the tidal wetlands are arguably the most environmentally important part of Holly Pond. He submitted a copy of a petition signed by more than 200 people. He said that the Darien Land Trust works to preserve natural conditions and enhance the environment. They have 10 critical criteria under which they review properties that they could or might obtain. He said that the Darien Land Trust property adjacent to the Holly Pond and south of the Stefanoni property contains six of the ten critical criteria that the Land Trust looks for. He handed out materials about the Darien Land Trust and a highlighted map.

Attorney Gleason submitted photographs of the Phragmites growth at the outlet of the drainage pipes into Holly Pond. He said that the Phragmites will only grow where there is fresh water (not salt water). The Phragmites grow in this area because of the constant outflow of fresh water from the upland drainage systems. The area is not inundated with salt water frequently enough to kill or discourage the Phragmites growth.

Attorney Gleason said that the Environmental Protection Commission has jurisdiction over activities within 100 feet of Holly Pond. He said that in the Darien Inland Wetlands and Watercourses Regulations, it refers to being within 100 feet of mean high water of the named rivers in Town but the definitions do not refer to the mean high water of Gorham's Pond or Holly Pond. He noted that the Environmental Protection Commission has asserted jurisdiction over other projects along the Five Mile River and Gorham's Pond and Holly Pond. He submitted materials regarding past EPC decisions regarding this site. He noted that the information, specifically the delineation of wetlands to the south of site, has changed between 2000 and 2002. In 2003, the Commission responded to an inquiry indicating that there were no reports of any information of inland wetlands within 50 feet of the site, but that the Commission would still regulate any activities within 100 feet of Holly Pond. Mr. Gleason said that in 2004, the staff response to an inquiry from Mrs. Stefanoni erroneously refers to the edge of Holly Pond as being the mean high water line. He said that the Commission is not bound by that staff report. He said that obviously the Stefanonis were trying to submit whatever information they could and get whatever answers they could to try to get the property exempt from the Environmental Protection Commission's jurisdiction. He referred to the 2002 letter from Tom Pietras (then working for the Stefanonis) in which he indicated that the area on the Land Trust property was no longer a watercourse but was now an extension of the tidal wetlands. Attorney Gleason submitted a copy of Section 2.1y.1 of the Inland Wetlands and Watercourses Regulations.

Mrs. Stefanoni said that she would like to respond to the points made by Mr. Gleason before too much more information is submitted on other issues. She felt that it would be less confusing if each issue was dealt with separately, rather than having many issues being debated at the same time.

Joseph Risoli, Professional Engineer, referred to a colored map and said that this map was slightly different from the map submitted in the previous packets. He said that it is a topographic map. It is a base map and that colored lines have been added to it and labeled to represent various wetland delineations. He said that inland wetlands as mapped in 2005 are shown in green and then the 50 foot regulated area is shown as a line parallel to that and is also shown in green. He said some of the wetlands are tidal wetlands (below Elevation 6.8) and some of the wetlands are upland or inland wetlands (above Elevation 6.8). In response to a question, he said that the accuracy of the map is quite precise and he can submit a signed and sealed copy of this survey for the record. He said that the dashed green line represents the wetlands line as established by Mr. Pietras in 2002 (and that this was scaled from previous maps) and the solid green line represents the wetlands line as determined

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by Mr. Kenny, the soil scientist hired by the Land Trust. The solid green line parallel to the inland wetlands line represents the 50 foot regulated area around the inland wetland. Attorney Gleason said that the 50 foot radius from the inland wetlands extends into the Stefanoni property and proposed activity, specifically regrading, the retaining wall, and filling is within the 50 foot regulated area.

Bill Kenny, Certified Soil Scientist, explained that he had inspected the Darien Land Trust property to determine if there are any inland wetlands on the site. He said that the shape of the wetlands that he flagged matched the finger shape that had been flagged by Tom Pietras several years ago. He said that the flags or markers left by Mr. Pietras several years ago were no longer in place. He said that the soils are wetland soils as defined by Connecticut State Statutes and that some of them are tidal wetlands and that some of them are, by statutory definition, inland wetlands. He said that Elevation 5.8 feet above sea level is typically the boundary of a salt marsh and tidal wetlands from a functional point of view and this is because of salt water inundation on a regular basis. The area at Elevation 5.8 and upland are ecologically an inland wetland condition, but the State defines the tidal wetlands up to 6.8. In this case, everything above 6.8 is both legally and ecologically, an inland wetland condition. In response to questions, he said that he has worked on 15 or so other sites that are similar tidal/inland wetlands situations. He said that the area at the north tip of the tidal wetlands has a concentration of fresh water input due to the slope of the land from the west, north and east sides of the site.

Mrs. Stefanoni submitted a packet of information with 20 tabs and a revised map entitled "Proposed Grading and Utility Plan" last revised December 12, 2005. She said that it has been their intent to avoid any regulated activities within the jurisdiction of the Environmental Protection Commission. To that end, they have revised the grading and drainage plan to assure that no activity is within 50 feet of any wetland, either tidal or inland wetland. She briefly reviewed copies of the revised plan and showed how the filling and regrading had been shifted to the north, and therefore would be away from the wetlands to the south. With respect to the 100 foot setback from Holly Pond, Mrs. Stefanoni referred to the Town Inland Wetlands & Watercourses Map, the FEMA maps used by the Town, the GIS map prepared by the Town, and Nancy Sarner's 2004 letter referring to mean high water line as being the edge of the pond. She said that in other applications to the Environmental Protection Commission, the edge of Holly Pond was measured from mean high water. She referred to applications at 99 Nearwater Lane, the YMCA, and 35 Beach Drive. She also read a quote from a court case stating that if a time tested interpretation of the Board is reasonable, then it is to be given great weight by the Court. She said that the edge of Holly Pond has historically been measured from the mean high water line, not the extreme high tide line or extreme edges of the pond during storms or other unusual events.

Mrs. Stefanoni said that the Environmental Protection Commission does not regulate connections to storm sewer systems that eventually lead to or discharge into Holly Pond. She said that permits were not requested or required for residential or non-residential developments that were outside the regulated areas, but that did connect to storm sewers in the streets. She said that such projects did not need EPC Permits for discharging into the storm system or into any watercourse or into Holly Pond. Mrs. Stefanoni said that she fully acknowledges the EPC's authority to comment to the Planning & Zoning Commission to express any concerns or issues that the EPC may have regarding the project. She said that she and her husband will try to respond to the EPC comments and to address those concerns or issues.

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Mr. Barry Hammons, the Professional Engineer hired by the Stefanonis, believes that the 50 foot regulated area does not touch any of the proposed development and activities shown on the revised plan. They had moved everything to the north to be outside of the potential EPC jurisdiction. He said that he will work with Mr. Risoli to get the detailed survey map from Risoli's firm to make sure that all of the activity is outside of the regulated area. Mr. Hammons said that the proposed building would be 55 feet from the wetland area and noted that part of that area is already used as a lawn for a single-family residence, and a drinking water pipe easement area. It was noted that revised plan had been submitted late on the afternoon of December 14, 2005 and that the revised Grading and Utility Plan appears to show that the retaining wall has been moved outside the 50 foot regulated area and that there would be no change of the existing lawn area within the 50 foot regulated area.

Attorney Wilder Gleason said that the inland wetlands and watercourses definitions include the description of a regulated activity as being one within the horizontal 50 to 100 foot regulated areas but that is not the limit of the EPC's jurisdiction. He said that the Regulations also indicate that if an activity affects a wetland or a watercourse, then it is regulated and needs a permit from the EPC. He said that the EPC can regulate activity outside the dimensional area if those activities affect wetlands or watercourses. He said that the State Supreme Court has ruled such provisions to be valid. He also noted that because the Commission has chosen not to regulate other projects in this way, it does not preclude the Commission from choosing to regulate the subject project. He noted that the other uses were permitted uses allowed in the zone and were not of concern to the neighbors but the activity being proposed is not in compliance with the Darien Zoning Regulations and is not a use normally permitted in the zone. He said it involves as much as 800 cubic yards of fill, the construction of a large retaining wall, approximately 30,000 square feet of living space and the construction of a 30 space parking lot in the midst of a single family residential zone and immediately adjacent to an environmentally sensitive area. He said that if the project may affect a wetland and/or a watercourse, then the EPC can exert jurisdiction and require a permit application. He said that he would provide additional documentation and references. Due to the late hour, Mrs. Stefanoni said that she would choose not to comment on such claims at this time.

In response to questions from Mr. Hillman, Director of Planning Jeremy Ginsberg said that the next available meeting date for the EPC would be on Wednesday, January 4, 2006. He said that the regular meeting would normally start at 7:30 p.m. on that night.

Mr. Hillman noted that in correspondence to the Commission at least one attorney has requested that the EPC take administrative notice of the Planning & Zoning Commission files regarding this matter. Mr. Hillman said that the EPC will not take notice of any other files. If anyone would like to submit something of relevance to the EPC, they must do so directly. The Commission will be forming its record only on the materials submitted to the EPC as part of this matter. The Commission unanimously agreed to continue the public hearing regarding this matter in the Auditorium of the Darien Town Hall at 7:30 p.m. on Wednesday, January 4, 2006.

Respectfully submitted,

David J. Keating  
On behalf of the Environmental Protection Commission